FOR ARGUMENT

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Supreme Court, U.S.
FILED
SEP - 1 2005
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No. 04-1131

IN THE

Supreme Court of the United States

Terry L. Whitman,

Petitioner,

v.

U.S. Department of Transportation, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari filed February 22, 2005

Certiorari granted June 27, 2005

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
CIVIL DOCKET ENTRIES FOR CASE A02-0112—CV (RRB)
"TERRY L. WHITMAN V
U.S. DEPT OF TRANSPORTATION"

RELEVANT DOCKET ENTRIES

Document #	Filed	Docket Text
1-1	05/23/02	Complaint filed; Summons issued.
1-2	05/23/02	PLF 1 Jury Demand
4-1	08/19/02	DEF 1-2 Answer to Complaint.
11-1	10/21/02	PLF 1 Unopposed motion to amend complaint and to supplement complaint w/att exhs.
12-1	10/23/02	RBB Order granting unopposed motion to amend complaint and to supplement complaint (11-1). cc: cnsl.
13-1	01/10/03	DEF 1-2 motion to dismiss the complaint and the amended complaint w/att exhs.
14-1	01/27/03	PLF 1 opposition to DEF 1-2 motion to dismiss the complaint and the amended complaint (13-1) w/att exhs.
15-1	02/03/03	DEF 1-2 reply to opposition to DEF 1-2 motion to dismiss the complaint and the amended

Document #	Filed	Docket Text
		complaint (13-1).
16-1	02-26-03	RRB Order granting motion to dismiss the complaint and the amended complaint (13-1). cc: cnsl
17-1	02/27/03	RRB Judgment that this case is dismissed for lack of subject matter jurisdiction. cc: cnsl, O&J 11507
18-1	03/26/03	PLF 1 appeal to 9CCA of (17-1) filed 02/27/03. cc:T. Witman, cnsl, Judge Beistline, 9CCA

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
CIVIL DOCKET FOR CASE #: 03-35303

Whitman

v.

U.S. Dept. of Transpo, et al.

DOCKET ENTRIES

DATE	PROCEEDINGS
4/10/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL FOR APPELLEES AND APPELLANT IN PRO PER. CADS SENT (Y/N): N.
	setting schedule as follows: appellant's opening brief is due 5/20/03; appellees' brief is due 6/20/03; appellants' optional reply brief is due 14 days from service of the answering brief . [03-35303] (ld) [03-35303]
4/10/03	Filed certificate of record on appeal RT filed in DC n/a [03-35303] (ld) [03-35303]
5/23/03	Filed original & 15 copies Aplt Terry L. Whitman opening brief (Informal: y) 26 pages; served on 5/20/03 [03-35303] (gva) [03-35303]
7/29/03	Filed original & 15 copies Aples DOT, Norman Y. Mineta brief, 47 pages, 5 Supplemental Excs Exc.: served on 7/28/03 minor defcy: (Needs Statement of Related Cases). Notified counsel. (gva) [03-35303]

DATE	PROCEEDINGS
8/14/03	Filed original & 15 copies Terry L. Whitman reply brief (Informal: n) 5 pages; served on 8/10/03 [03-35303] (gva) [03-35303]
9/11/03	FILED CERTIFIED RECORD ON APPEAL: 1 CLERK'S RECORD. (ORIGINAL) [03-35303] (sd) [03-35303]
9/12/03	SUBMITTED TO SCREENING PANEL 351. (Written) [03-35303] [03-35303] (th) [03-35303]
3/5/04	Removed from screening calendar. [03-35303] [03-35303] (th) [03-35303]
5/3/04	CALENDARED: ANCHORAGE July 7, 2004 9:00 AM Courtroom 2, 2nd Floor [03-35303, 03-35838] (rei) [03-35303 03-35838]
6/24/04	Filed order (Deputy Clerk: hh) ... This case therefore shall be submitted on the briefs and record, without oral argument, on Wednesday 7/7/04, in Anchorage, Alaska. (phoned/faxed) [03-35303] (gva) [03-35303]
7/7/04	SUBMITTED ON THE BRIEFS TO: Cynthia H. HALL, Andrew J. KLEINFELD, Kim M. WARDLAW. [03-35303] (jmr) [03-35303]
8/30/04	FILED OPINION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Signed, Published. Cynthia H. HALL; Andrew J. KLEINFELD; Kim M. WARDLAW, author.) FILED AND ENTERED JUDGMENT. [03-35303] (ru) [03-35303]
10/12/04	[5204407] Filed original & 50 copies Appellant Terry L. Whitman's petition for panel rehearing and petition for rehearing en banc of 2 pages; served on 10/9/04 (PANEL AND ALL ACTIVE JUDGES & INTERESTED

DATE	PROCEEDINGS
	SENIOR JUDGES) [03-35303] (gva) [03-35303]
11/24/04	Filed order (Cynthia H. HALL, Andrew J. KLEINFELD, Kim M. WARDLAW) ... The petition for panel rehearing and the petition for rehearing en banc are DENIED. [5204407-1] [03-35303] (gva) [03-35303]
12/3/04	MANDATE ISSUED [03-35303] (gva) [03-35303]

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In Propria Persona Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TERRY L. WHITMAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNITED STATES	)	
DEPARTMENT OF	)	**COMPLAINT**
TRANSPORTATION;	)	**AND**
THE HON. NORMAN Y.	)	**DEMAND FOR**
MINETA,	)	**JURY TRIAL**
U.S. Secretary of	)	
Transportation;	)	
	)	
Defendant.	)	

This complaint addresses a continuing violation of my rights as an employee of the Department of Transportation, Federal Aviation Administration (Agency), Anchorage Air Route Traffic Control Center located at 700 North Boniface Parkway, Anchorage, Alaska. Specifically, the violations of my rights involve misapplication of the Agency's random

substance testing program which have resulted in my being tested an inordinate number of times, my selection from an "alternate list" to replace employees already selected for testing, and in the denial of my rights to representation of my choosing while being tested.

By not administering substance testing randomly, the Agency has violated Title 49 U.S.C. Section 5331(d)(8), which states that the Secretary of Transportation shall develop requirements that shall "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances."

JURISDICTION

The United States District Court for the District of Alaska has jurisdiction over this dispute because the U.S. Department of Transportation is a party to this dispute involving discrimination in the workplace.

FACTS

On April 20, 2002 I was substance-tested for alcohol. The test was administered by A.J. Clark under the supervision of Malcolm Monds. The Agency Site Coordinator for that day was Robert Phillips. My selection for testing that day was the fourth time in a row and the fourteenth time overall since testing was instituted in 1987.

When Mr. Phillips notified me that I was selected for testing on April 20, he asked me if I wanted my facility bargaining unit representative present while I was being tested. I responded that I did not need the bargaining unit representative present, but I wanted Mr. Phillips to call her to notify her that I was being tested. Mr. Phillips went to the watch desk and placed a phone call. When Mr. Phillips returned, he told me that he was unable to reach the facility representative. I then asked Mr. Phillips if he would contact my work section

supervisor. Mr. Phillips again went to the watch desk and returned to tell me that he was unable to contact my supervisor. Mr. Phillips asked if he should try to contact the regional bargaining unit representative. I asked if he would, but again Mr. Phillips was unsuccessful in establishing contact. I submitted to the alcohol breathalyser without the knowledge of my bargaining unit representatives or my supervisor.

This experience was similar to the first time alcohol testing was conducted. On that occasion, the Site Coordinator was Joseph Rollins. After I reported to work for a day shift, Mr. Rollins notified me that I had been selected for testing and informed me that my regional bargaining unit representative had just gone home from a midnight shift and that my facility bargaining unit representative was not due in until the following shift which was a swing shift. Mr. Rollins ordered me to submit to the substance testing without representation of my choosing. I submitted to the testing under protest. My bargaining unit representatives were not informed of the substance testing until after the fact.

The third time I was substance-tested by urinalysis, I was told I was being selected from an "alternate list" to replace two employees who were being released to go home after they had already been selected and were awaiting testing. The testing technician that day was Malcom Monds and the Site Coordinator was John Turner. This third selection for testing was part of a string where I was selected for urinalysis testing the first seven times in a row.

INJURY

The substance testing performed by the Agency under Federal Aviation Administration Alaskan Region Flight Surgeon Robert W. Rigg, M.D. is not random. For example, the eleventh time I was substance tested was on March 28, 2000. While I was awaiting testing, two employees who have been at the facility since the inception of testing in 1987, each made the unsolicited comment that this was the first time they

had ever been selected for substance-testing. By my own informal methods, I have determined that the average number of substance-testing administered to similarly-situated employees is four (4).

On October 4, 2001, I was substance tested for the thirteenth time. When my test results were returned to me, the results were accompanied by a document dated October 7, 2001 prepared by Substance Abuse Program Manager Marge Cholometes. The title of the document was "MOST FREQUENTLY ASKED QUESTIONS" which addressed drug and alcohol testing.

In MOST FREQUENTLY ASKED QUESTIONS, Ms. Cholometes states that the collection goal for random test lists equates to one-third of covered employees and does not exceed 24. The expected value for being selected at random for any single instance of substance-testing is one chance in three. Then, for the first seven tests conducted at my workplace, the expected value for random selection would be two-and-one-third times. My selection for substance testing the first seven times in a row exceeds this expected value by three hundred-four per cent (304%). Put another way, the chance of my being selected for testing at random the first seven times in a row is one-third raised to the seventh power, or one chance in 2,187. The total number of tests conducted the first seven times was one hundred-sixty-eight (168). The odds against being tested seven times in a row exceeds the total number of tests conducted by one thousand-three hundred per cent (1,300%).

In MOST FREQUENTLY ASKED QUESTIONS, Ms. Cholometes also states "Due to the large number of covered employees in facilities such as centers, the test list is broken down into sub-lists of approximately 72 names each, resulting in multiple visits to some facilities. Further on, in answer to the question "Why is it that every time the collector shows up at my facility my name is on the so called random list?" Ms. Cholometes states "If you are in a safety or security related

position that has been identified as a 'testing designated position' (TDP) your name will be on the list."

These statements, whether taken separately or together, are evidence that the selection process is not random. In the former statement, sub-lists divided into thirds with multiple visits would guarantee that everyone who is eligible would be tested by the third visit. It would automatically prevent my being tested more than once in three visits. As stated above, I was tested the first seven times in a row, and most recently, I have been tested four times in a row. The latter statement indicates that everyone who is eligible is on the list. This is not a characteristic of a random selection process. It seems to guarantee that everyone at a facility such as an air route traffic control center where I work would be tested. However, these explanations fail to explain how two similarly-situated co-workers escaped testing for thirteen years while during the same period I was tested ten times.

Ms. Cholometes' explanations are contradicted by the U.S. Department of Transportation pamphlet (revised March 1989) entitled "DOT's Drug Program, Random Testing: How it Works." Under the heading "Random Testing" the pamphlet states "The identification of employees for random drug testing is accomplished using a computer draw from a single pool of all the employees who occupy safety or security sensitive positions." The pamphlet rebuts the notion that everyone is on the list, and does not authorize "sub-lists divided into thirds" or "alternate lists."

Therefore, the overall number of times I have been tested, the two periods where I have been selected repeatedly for testing, the denial of my rights to representation, the failure to inform my bargaining unit representatives when testing is being conducted, and my selection for testing from an "alternative list" are all related in that they represent a continuing violation of my rights as a federal employee and as an individual. This continuing violation is due to the Agency testing program where the selection process is not done on a sta-

tistically equal basis with respect to my duty location.

RELIEF

This court can provide injunctive relief by ordering a survey of similarly-situated employees to establish an average number of selections for substance-testing. If the number of times I have been tested exceeds the average by an amount that establishes by a preponderance of evidence that the testing is not random, the Court can order the Agency to remedy the situation by whatever means deemed appropriate, such as enjoining the Agency from subjecting me to any further substance-testing until the average number for similarly-situated employees reaches fourteen.

SIGNED,

TERRY L. WHITMAN
Plaintiff

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In Propria Persona Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TERRY L. WHITMAN,	)	
	)	
Plaintiff,	)	
	)	**Case No.**
	)	**A02-0112 CV**
vs.	)	**(RRB)**
	)	
UNITED STATES	)	**UNOPPOSED**
DEPARTMENT OF	)	**MOTION TO**
TRANSPORTATION; THE HON.	)	**AMEND**
NORMAN Y. MINETA, U.S.	)	**COMPLAINT**
Secretary of Transportation;	)	**AND**
	)	**UNOPPOSED**
	)	**MOTION TO**
	)	**SUPPLEMENT**
Defendant.	)	**COMPLAINT**

I, TERRY L. WHITMAN, Plaintiff proceeding pro se move that the Federal District Court allow Plaintiff to amend the COMPLAINT identified above pursuant to Federal Rules of Civil Procedure (FRCP) Rule 15(a) and to supplement the COMPLAINT pursuant to FRCP Rule 15(d). The Assistant U.S. At-

torney has agreed not to oppose the motion provided that the motion is filed on or before October 18, 2002.

MOTION TO AMEND COMPLAINT

Plaintiff moves to amend the cause of action for the COMPLAINT to Title 49, Subtitle VII, Part A, subpart iii, Chapter 451, Section 45104(8), as this deals more specifically with authority for, and rights under, aviation safety programs.

Plaintiff amends the COMPLAINT by adding the date October 30, 1996 as the date when Plaintiff was first subjected to an alcohol breathalyzer test. This supplements the claims made in the COMPLAINT under the heading FACTS, in the paragraph beginning on the last line of page 2 and continuing on page 3 of the COMPLAINT.

MOTION TO SUPPLEMENT COMPLAINT

Plaintiff moves to supplement the COMPLAINT due to recent events beginning with a drug-testing incident on September 25, 2002, that are related to, or likely grew out of the filing of the COMPLAINT. A description of the events is given below. The request for RELIEF remains the same as for the original COMPLAINT.

FACTS

Upon arriving at work at the Anchorage Air Route Traffic Control Center (Center) on the afternoon of September 25, 2002, I was ordered by Manager Harold Joseph Brown to report to the large conference room. My arrival at the large conference room was followed by the arrival of Assistant Air Traffic Manager Daria Gerlach, who was serving as Site Coordinator (SC), Drug Program Coordinator (DPC) Malcolm Monds, and contract technician Charlie Y. Gilman. I was informed by Mr. Monds that I was being subjected to a "makeup test" for a previously conducted round of random drug testing by urinalysis.

I challenged the legality of conducting a makeup test citing Title 49, United States Code (U.S.C.). I submitted to the urinalysis without receiving a satisfactory explanation justifying having a team show up at the Center to exclusively test me for random testing which supposedly took place on August 28, 2002.

The following morning, September 26, 2002,1 sent an e-mail to Alaskan Region Flight Surgeon Dr. Robert W. Rigg documenting what had occurred the night before.[1] To recapitulate, I related to Dr. Rigg that I was summoned for substance testing; that I did not receive a satisfactory explanation justifying the legality for the "makeup test"; that the technician who collected the urine specimen failed to properly seal the specimen bag and then advocated tampering with the serial numbers on the specimen bottles; that my request to produce another urine specimen within two hours was refused; and that the makeup test was not legally justified because the random test conducted on August 28, 2002 occurred on a midnight shift I was never scheduled to work.

The dates I cited in the September 26 e-mail to Dr. Rigg for when the random testing was said to have occurred were for the midnight shift that began at 11:00 PM on August 27, 2002, continuing until 7:00 AM on August 28, 2002. However, the correct dates for the testing at issue were for the midnight shift that began at 11:00 PM on August 28, 2002, ending at 7:00 AM on August 29, 2002. I was able to establish these dates because my bargaining unit representative, Joseph Waterer, was subjected to drug testing beginning at 11:05 PM on August 28, 2002. Mr.Waterer consented to provide me with a copy of his Federal Drug Testing Custody and Control Form (Specimen ID No.

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[1] See Exhibit A, e-mail from Terry Whitman to robert.rigg@faa.gov sent Thursday, September 26, 2002 7:39 AM.

35241699).

When Mr. Waterer relieved me from my shift at approximately 11:00 PM on September 25, 2002, he related to me his attempts to return Ms. Gerlach's call that afternoon by leaving messages on the answering machine in her office at or after 3:00 PM. When Mr. Waterer stated that Ms. Gerlach did not respond to the messages before he left for work the same evening, I responded that I saw Ms. Gerlach leave the parking lot between 4:00 PM and 4:30 PM that evening.

On September 27, 2002, I received a reply from Dr. Rigg to my e-mail message of September 26, 2002 deferring back to "...those who have jurisdiction..."[2] Each test is authored by Dr. Rigg in his role as Medical Review Officer (MRO) for substance testing and could not be authorized otherwise.

Mr. Monds responded to my challenge to the Agency's authority to conduct makeup tests for random testing in an e-mail dated 9/26/02.[3] In this e-mail response, Mr. Monds stated that he looked through the applicable Agency order "3910.1C"[4] and acknowledged "...it does not address exactly what you asked about." Then Mr. Monds referred to Guidance for Supervisors and Managers and Guidance for Working the Test List in the Site Coordinators Handbook (SC Handbook).[5] Mr. Monds also directed me to a web site containing the referenced directives.[6]

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[2] See Exhibit B, e-mail from robert.rigg@faa.gov sent Friday, September 27, 2002.

[3] See Exhibit C, e-mail forwarded to Terry Whitman, originally from Mack Monds to Terry Whitman dated 09/26/02 3:35 PM, Subject: Random testing question.

[4] See Exhibit D, applicable portions of DOT Order 3910.1C (12-28-94), Drug and Alcohol-Free Departmental Workplace.

[5] See Exhibit E, applicable portions of FAA Site Coordinators Handbook.

[6] See Exhibit C, reference to http://www.faa.gov/avr/aam/isap/!

I examined these directives in addition to the Department of Transportation's Drug and Alcohol Testing Guide[7] located at the aforementioned web site for myself. I concluded that nothing in these directives authorized rescheduling for an employee who was never notified of selection for testing due to a legitimate reason beyond the employee's control.

On September 25, 2002, Mr. Monds claimed that the makeup test was for August 28, 2002 because I was within two hours of the end of my shift. In my September 26 e-mail to Dr. Rigg, I documented that Mr. Monds showed me my name on a selection list, although my no-show reason was concealed.

Whether an employee is near the end of a scheduled work shift or off duty, these are legitimate no-show reasons. The SC Handbook directs the SC to compute an estimated time to accomplish all testing, and to move down the list in sequential order, identifying and annotating the test list of employees who are not available and why.[8] The SC Handbook further directs the SC to proceed to the next employee on the selection list, repeating the process until the test list is exhausted.[9]

The only authorization in the handbook for rescheduling an employee under random testing is when the employee has been notified of selection for random testing, has proceeded to the test site, but fails to produce a sufficient amount of urine (45 milliliters).[10] This did not apply to

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[7] See Exhibit F, applicable portions of Department of Transportation, Drug and Alcohol-Free Departmental Workplace Drug and Alcohol Testing Guide.

[8] See Exhibit E, (p. 5), Section IV.A(4), Phase II.

[9] See Exhibit E (p. 6), Section IV.A(7).

[10] See Exhibit E (p. 7), Section IV.C. Procedures for Reschedules. Also see Exhibit F (pp. 3, 4), Chapter VIII.C. Failure of Employee to Provide Urine Specimen.

me since I was not notified of selection for testing on August 28, 2002, and obviously never proceeded to the test site.

INJURY

Ultimately, there is no authority to conduct a makeup test under random testing for an employee who has been legitimately excused the day the testing was originally conducted. It is not authorized by Title 49 U.S.C. In his e-mail reply of September 26, 2002, DPC Malcolm Monds admitted that DOT Order 3910.1.C. "...does not address exactly what you asked about." Mr. Monds further claimed "All this information is located in the Site Coordinator's Handbook" when in fact no authorization exists for "makeup tests" for employees who were not notified of selection on the date scheduled for testing. What the Site Coordinator's Handbook does contain is an admonition to the Site Coordinator (SC) to follow the procedures for working the test list closely as this "...will prohibit the SC from 'picking and choosing' employees who are identified for random testing."[11]

On October 2, 2002, I encountered fellow employee Mark Ramp at work and explained to him that just after I talked to him on September 25, 2002, that I had been subjected to substance testing for the fifteenth time and that this time I was told it was a "makeup test." Mr. Ramp related to me that he had served as a union observer for substance testing and that it was his experience that when an employee was unavailable for testing that the testers moved to the next employee on the test list. Mr. Ramp further indicated to me that as a union observer he had never heard of makeup tests.

This reinforces my claim that the testing is not random. In defining random testing, DOT Order 3910.1.C directs "Under this type of testing, all covered employees shall have an equal

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[11] See Exhibit E (p. 6), Section IV.A(8).

statistical chance of being selected for testing within a specified time frame."[12]

In the immediate context, the specified time would be the midnight shift beginning at 11:00 PM August 28, 2002 and ending on August 29, 2002. The testing team violated my right to an equal statistical chance under this order by testing me 28 days after the above specified time frame after stating to me that I had a legitimate no-show reason. Exactly what the no-show reason is remains to be determined.

Mr. Monds' claim that it was necessary to conduct makeup tests in order to exhaust the test list is contradicted by the SC Handbook to which he referred me in his September 25 e-mail reply. The SC Handbook directs "If an employee is unavailable for testing, the next employee on the list will be notified to report for testing. This process continues until the predetermined number of tests for that day are done or the list is exhausted, whichever comes first."[13]

Subjecting me to a makeup test on September 25, 2002 after the list was exhausted on August 29, 2002 violates my right to a fair distribution of tests under Title 49 U.S.C., Section 45104(8) and DOT Order 3910.1.C., Chapter IV.4.a. The makeup test on September 25, 2002 also raises a question about Mr. Monds' claim that makeup testing is not done to fill a testing quota for the contractors.

In the overall context, prima facie evidence exists pointing to Agency officials who have violated my right to an equal statistical chance of selection under Title 49 U.S.C., Section 45104(8) and DOT Order 3910.1.C., Chapter IV.A.a through the use of questionable and possibly illegal selection lists.

This latest incident on September 25, 2002 highlights the lengths to which government officials will go to selectively tar-

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[12] See Exhibit D (pp. 2, 3), Chapter IV.4.a Random Testing.

[13] See Exhibit E (p. 4) Section II.A. Random Drug-Testing Checklist for Site Coordinators (SC).

get me for substance testing which is advertised as random. The incident on September 25, 2002 violates my First Amendment right to privacy under the Constitution in that it is indistinguishable from having a government team show up at my door while I am off duty to order me to produce a urine sample.

I, TERRY L. WHITMAN, declare under penalty of perjury, that I have reviewed the above MOTION, and that the information contained in this MOTION is true and correct.

DATED this day of October 18, 2002, at Anchorage, Alaska.

TERRY L. WHITMAN
Pro Per Plaintiff

NAGE Term Agreements
Human Resource Management (AHR)

NATIONAL AGREEMENT
Between the ASSOCIATION OF GOVERNMENT EMPLOYEES AGREEMENT, SEIU/AFL-CIO
and the
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION

May 26,1998

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PARTIES TO THE AGREEMENT

This Agreement is made by and between the National Association of Government Employees, SEIU/AFL-CIO ("the Union") and the Federal Aviation Administration, Department of Transportation ("the Employer"). The Union and the Employer are referred to collectively as "the Parties".

* * * *

ARTICLE 13
GRIEVANCE PROCEDURE

Section 1. Except for matters excluded in this Agreement, a grievance is defined as a complaint: (1) by any unit employee concerning any matter relating to the employment

of the employee; (2) by the Union concerning any matter relating to employment of unit employees; (3) by any unit employee, the Union, or the Employer concerning (a) the effect or interpretation, or a claim of breach of this Agreement or; (b) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Section 2. The expeditious settlement of grievances at the lowest possible level is in the best interest of the government service. The Union shall ensure that, when representing employees of the unit, no complaint or grievance will be taken or pursued without first having been brought to the attention of the Employer for possible resolution.

Section 3. Unit employees covered by this Agreement may present a grievance with or without union representation at the grievant's discretion. However, the Union shall have the right to have its representative present at the grievance meeting. This right to individual representation does not include the right to take the matter to arbitration, unless the Union agrees to do so.

Section 4. The following matters are specifically excluded:

a. Political activities.

b. Retirement, Life or Health Insurance.

c. Suspension or removal for national security reasons.

d. Examination, certification, or appointment.

e. Position Classification which does not result in loss of grade or pay of an employee.

f. Non selection for promotion from a group of properly ranked and certified candidates.

g. Allegations of mismanagement.

h. EEO complaints.

i. Matters appealable to the Merit Systems Protection Board and Office of Special Counsel.

j. Termination of temporary/probationary employees.

k. The adoption or nonadoption of a suggestion, except where an employee submitted a suggestion which was rejected and within one year another employee subsequently submitted the same suggestion which was adopted and an award granted.

l. The decision to grant an award except where the allegation is that the decision was arbitrary and capricious, or inequitable.

Section 5. Grievances may be initiated by employees, either singularly or jointly, or by the Union, or by the Employer. An employee or group of employees in the unit may be represented only by the exclusive representative, or by a person appointed by the Union, in filing a grievance under the negotiated procedure.

Section 6. The Employer and the Union expect employees and supervisors to make a sincere effort to reconcile their differences. When such efforts fail, however, the following procedures are established for settlement of grievances:

Step 1. A grievance must be discussed with the employee's immediate supervisor within fifteen (15) calendar days after the occurrence of the matter which precipitated the grievance. An employee filing after fifteen (15) calendar days of the occurrence has the burden of showing he/she could not have been aware of the event at the time of occurrence. The grievance shall first be discussed informally by the aggrieved employee and his/her representative, if any, and the immediate supervisor involved.

The aggrieved employee or his/her representative, if any, must inform the supervisor a grievance is being filed. If the matter is not settled within fifteen (15) calendar days from the time of this meeting, the grievance may be moved to the next step.

Step 2. If no satisfactory settlement is reached in Step 1, the grievance shall be reduced to writing, stating the issue(s) involved and the corrective or remedial action sought, and submitted to the Facility Manager or his/her designee within the fifteen (15) calendar days after the Step 1 decision. The employee will be advised of the Facility Manager's or designee's decision, in writing, within fifteen (15) calendar days after receipt of said grievance. By mutual consent, a meeting will be held to discuss the grievance and attempt resolution.

Section 7. If the employee is in a duty status, a reasonable amount of official time will be granted an aggrieved employee to present a grievance on the employer's premises through this grievance procedure; however, no overtime/compensatory time/credit hours will be paid/authorized to any such employee. An employee desiring official time for the foregoing purposes shall inform his/her immediate supervisor, if available, or the next higher level of line supervisor who is available, of the reason he/she desires to absent him/herself from his/her facility.

Section 8. If two or more employees initiate identical grievances (where the basis for the grievance and corrective action being sought are identical), the Union, if it has been designated as representative, will call the employees together and have them select one of the grievances for processing. The decision made on the grievance selected for processing will be equally applicable to all of the other identical griev-

ances. The Union will inform the Employer of multiple grievants, the individual selected as the representative grievant, and the names of all the other employees party to the grievance.

Section 9. Once a grievance has been accepted for processing under this Grievance Procedure, failure of the aggrieved employee or the Union to comply with any applicable time limit terminates further consideration of the grievance. Failure of a management official of the Employer to comply with any applicable processing time limit will entitle the grievant to advance to the next step. Any time limits specified in the Agreement may be extended by mutual written agreement by the Parties.

Section 10. Employer grievances shall be filed in writing by the Facility Manager, or designee, with the NAGE facility representative, or his/her designee, within fifteen (15) calendar days of the event or knowledge of the event. The grievance shall specify the basis for the grievance and the corrective relief sought. The NAGE facility representative, or his/her designee, shall issue a written decision within fifteen (15) calendar days of receipt of the grievance. By mutual consent a meeting will be held to discuss the grievance and attempt resolution.

Section 11. Employer grievances at the regional level shall be filed in writing by the Division Manager, or his/her designee, with the NAGE Regional Director, or his/her designee, within fifteen (15) calendar days of the event or knowledge of the event. The grievance shall specify the basis for the grievance and the corrective relief sought. The NAGE Regional Director, or his/her designee, shall issue a written decision within fifteen (15) calendar days of receipt of the griev-

ance. By mutual consent a meeting will be held to discuss the grievance and attempt resolution.

Section 12. Union grievances shall be filed in writing with the Facility Manager, or his/her designee, by the NAGE facility representative, within fifteen (15) calendar days of the event or knowledge of the event. The grievance shall specify the basis for the grievance and the corrective relief sought. The Facility Manager, or his/her designee, shall respond within fifteen (15) calendar days of receipt of the grievance. By mutual consent, a meeting will be held to discuss the grievance and attempt resolution.

Section 13. Union grievances at the Regional level shall be filed, in writing, with the Division Manager, or his/her designee, by the NAGE Regional Director or other designee of the Union within fifteen (15) calendar days of the event or knowledge of the event. Union grievances at the National level shall be filed in writing, with the Program Director of Labor and Employee Relations, by the NAGE Local R3-10 President within fifteen (15) calendar days of the event or knowledge of the event. The grievance shall specify the basis for the grievance and corrective relief sought. The Division Manager or the Program Director of Labor and Employee Relations, shall respond within fifteen (15) calendar days of receipt of the grievance. By mutual consent a meeting will be held to discuss the grievance and attempt resolution.

Section 14. Grievances not resolved through the provisions of this Agreement may be referred to Arbitration by either the Union or the Employer within ten (10) calendar days of the receipt of the decision completing the negotiated grievance procedure.

Section 15. If there are questions as to whether or not a grievance is on a matter subject to the grievance procedure in this Agreement or is subject to arbitration, the issue shall be submitted to the arbitrator for decision. Prior to submission of any grievance on the merits, a decision will be rendered on questions of timeliness, grievability, or arbitrability by an arbitrator. By mutual agreement, the Parties may select another arbitrator to render a decision on the merits.

Section 16. The Parties agree to approach grievances as a resolution process and shall not withhold evidence during the process in an effort to gain advantage during arbitration. The Parties will exchange copies of files and records that they plan to use as evidence before an arbitrator. This information will be exchanged at least seven (7) calendar days in advance of the arbitration hearing. The Parties will exchange witness lists seven (7) calendar days prior to the arbitration hearing. Documentary evidence not provided to the other party prior to the arbitration hearing but first offered at the hearing shall cause the record to remain open until the party not provided the evidence has ample opportunity to rebut the new evidence.

ARTICLE 14
ARBITRATION PROCEDURE

Section 1. When a matter pursued through the Negotiated Grievance Procedure is not satisfactorily resolved, the grievance may be referred to arbitration upon written request of the Employer or the Union. The request to invoke arbitration must be submitted within ten (10) calendar days of receipt of the decision completing the negotiated grievance procedure, otherwise the request for arbitration will be untimely. Only the Employer and the NAGE Local R3-10 President may invoke arbitration.

Section 2. Within the ten (10) calendar day time limit, the moving party will request the Federal Mediation and Conciliation Service to provide a list of five (5) arbitrators and will deliver a copy of the request to the other party. Representatives of the Parties will confer within ten (10) calendar days of receipt of the list of arbitrators to select one to hear the grievance. The representatives will each strike one Arbitrator's name from the list of five (5); they will then repeat this procedure. The remaining name will be the duly selected Arbitrator. A flip of the coin will decide which party strikes first.

Section 3. Upon mutual agreement of the Parties a transcript will be made of the hearing. A copy will be furnished to the arbitrator, and each party will be furnished a copy. Any additional copies will be paid for by the requesting party. The cost of a transcript requested by one party for its exclusive use and not shared shall be borne by the requesting party. If it is mutually agreed to request a transcript, the cost will be borne equally.

Section 4. The cost of the arbitrator's fees and expenses will be paid by the losing party. If the grievance is sustained, the grieving party is the prevailing party and incurs no cost. If the grievance is denied, the grieving party is the losing party and pays the arbitrator's fees and expenses. In cases of a split decision, such costs will be borne equally by the Parties * * *.

* * * *

Supreme Court, U.S.
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In the Supreme Court of the United States

TERRY L. WHITMAN, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.* (CSRA), provides that "any collective bargaining agreement" between the government and employees' unions "shall provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Until 1994, Section 7121(a)(1) also provided that, with specified exceptions not implicated here, "the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988). As part of a 1994 technical and conforming amendment, the word "administrative" was added to Section 7121(a)(1), which now provides that "the [collective bargaining agreement grievance] procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

The questions presented are as follows:

1. Whether the 1994 technical amendment to 5 U.S.C. 7121(a)(1) implicitly authorized federal employees to sue in federal district court for employment grievances, although the CSRA's comprehensive remedial system lacks an express judicial remedy for grievances.

2. Whether the CSRA precludes petitioner from seeking equitable relief from a federal district court on the ground that his employer allegedly violated his constitutional rights by requiring him to take drug tests.

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